No. 11,568

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO), et al.,
Appellants,

vs.

CABLE A. WIRTZ, as Judge of the Circuit Court of the Second Judicial Circuit, Territory of Hawaii, and MAUI AGRICULTURAL COMPANY, LIMITED,
Appellees.

Upon Appeal from the Supreme Court of the Territory of Hawaii.

APPELLANTS' REPLY BRIEF.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
HARRIET BOUSLOG,
MYER C. SYMONDS,
By HARRIET BOUSLOG,
GEORGE R. ANDERSEN,
240 Montgomery Street, San Francisco, California,
Terminal Building, Honolulu, T. H.,
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Contents

Table of Authorities Cited

Cases

Constitution and Statutes

Congressional and Government Reports

Texts

No. 11,568

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO), et al.,

Appellants,

vs.

CABLE A. WIRTZ, as Judge of the Circuit Court of the Second Judicial Circuit, Territory of Hawaii, and MAUI AGRICULTURAL COMPANY, LIMITED,

Appellees.

Upon Appeal from the Supreme Court of the Territory of Hawaii.

APPELLANTS' REPLY BRIEF.

PRELIMINARY STATEMENT.

The Appellee, Cable A. Wirtz, adopts *in toto* the brief of the Appellee, Maui Agricultural Company, Limited, commenting in addition on only one point. This reply brief is directed to the answering briefs of each of the Appellees.

QUESTION PRESENTED.

The question presented is the effect on the jurisdiction of territorial courts of the Norris-LaGuardia Act. Whether the Norris-LaGuardia Act affects the jurisdiction of circuit courts procedurally or substantively is certainly in issue under the petition for Writ of Prohibition.

STATEMENT OF THE CASE.

Since the question presented to and considered by the lower court related to the effect of the Norris-LaGuardia Act on the jurisdiction of territorial circuit courts, it is Appellants' contention that the substance of the *ex parte* affidavits filed by the Appellee Maui Agricultural Company, Limited, and the allegations contained in that Company's petition before the defendant judge in the territorial circuit court, are irrelevant.

As a matter of fact, Mr. Tavares, Attorney for the Appellee, Maui Agricultural Company, Limited, was at the time of the presentation of the case below the Attorney General of the Territory representing the defendant judge. He and Mr. Winn who was then counsel for the Maui Agricultural Company, Limited, conceded, and it was so stipulated by counsel for all parties before the argument in the lower court, that the contents of the return of the defendant judge were irrelevant to the issues before the lower court. It was further agreed and stipulated that compliance with local laws was not in issue.

ASSIGNMENTS OF ERROR.

Appellants' assignments of error were all directed to express holdings of the lower court. In insisting that only one assignment of error is relevant, Appellees apparently wish to claim the result of the lower court's reasoning without being bound by the process by which it was reached.

Appellants showed in their opening brief that the lower court's conclusion was reached because it found that Congress in the legislative definition of "court of the United States" contained in the act manifested an intention to exclude legislative courts. If each step used in reaching that conclusion is demonstrably false, we are back to the point from which we started—the clear-cut legislative definition which on its face applies to territorial courts. Surely some valid substitute reasoning or authority must be found to justify construing away the unambiguous definition. Yet Appellees cite none.

SUMMARY OF ARGUMENT.

The Appellees unsuccessfully attempt to conceal their real conviction that the Norris-LaGuardia Act is a monstrous and intolerable interference with employers' rights. They strongly imply the application of the Act to the territory would destroy circuit courts.

Obviously motivated by their disagreement with the legislative policy of the Norris-LaGuardia Act, they urge this court to ignore the purpose and public policy

of Congress in adopting the Act, the explicit language Congress used to effect its purpose, and the result of a refusal to accede to the public policy. While they do not, as indeed they cannot, deny the power of Congress to apply the Act to the Territory, they deny that it is conceivable that Congress exercised the power which it has. Appellants take issue with every premise relied upon by Appellees in their Answering Briefs. In reply to the Appellees, Appellants contend:

I. The Constitution of the United States vests in Congress the power to legislate for territory under the jurisdiction of the United States; by the Hawaiian Organic Act Congress—although delegating the exercise of some of its power to the territorial legislature and to territorial courts—specifically reserved to itself the power to legislate for the territory at any time, and required that the power so delegated be at all times exercised in a manner consistent with laws of the United States; Congress has exercised this power on numerous occasions; and Congress exercised this power over territories in passing the Norris-LaGuardia Act.

II. All laws of the United States, not locally inapplicable, are in force in the territory; there is nothing in the Norris-LaGuardia Act that makes it locally inapplicable; nor was there at the time of the adoption of the Norris-LaGuardia Act any territorial law with which its provisions were inconsistent, or in conflict.

III. The history of the Norris-LaGuardia Act and its specific provisions indicate that Congress intended that it should be given full force and effect wherever Congress had the power to make it effective.

IV. A circuit court of the territory, which is a creature of Congress exercising power delegated by Congress, cannot enjoin the exercise of rights specifically made lawful by Act of Congress.

V. Contempt proceedings will not lie for violation of an order which the court clearly had no jurisdiction to issue.

ARGUMENT.

I.

THE CONSTITUTION OF THE UNITED STATES VESTS IN CONGRESS THE POWER TO LEGISLATE FOR TERRITORY UNDER THE JURISDICTION OF THE UNITED STATES; BY THE HAWAIIAN ORGANIC ACT CONGRESS—ALTHOUGH DELEGATING THE EXERCISE OF SOME OF ITS POWER TO THE TERRITORIAL LEGISLATURE AND TO TERRITORIAL COURTS—SPECIFICALLY RESERVED TO ITSELF THE POWER TO LEGISLATE FOR THE TERRITORY AT ANY TIME AND REQUIRED THAT THE POWER SO DELEGATED BE AT ALL TIMES EXERCISED IN A MANNER CONSISTENT WITH LAWS AND CONSTITUTION OF THE UNITED STATES; CONGRESS HAS EXERCISED THIS POWER OVER THE TERRITORY OF HAWAII ON NUMEROUS OCCASIONS; AND CONGRESS EXERCISED ITS POWER OVER TERRITORIES IN PASSING THE NORRIS-LaGUARDIA ACT.

The Appellees in the Organic Act of 1900 purport to discover an intent on the part of Congress at that

time to give the autonomy of a state to the Territory of Hawaii. Then wishfully, they argue that no subsequent declarations of public policy or of laws of the United States can be construed to change the *status quo* as of that date. But even their premise is a half-truth at best.

Article IV of the Constitution gives to the Congress

> Power to dispose of and make all needful rules and regulations respecting the Territory or other Property belonging to the United States.

Section 5 of the Organic Act (48 U.S.C.A. 495) provides in part:

> That the Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States.

Section 6 of the Organic Act (48 U.S.C.A. 496) provides:

> That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States.

Section 55 of the Organic Act (48 U.S.C.A. 519, 562) provides in part:

> That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable.

At pages 17-23 of Appellants' Opening Brief are set forth the provisions of the Organic Act whereby Congress delegated to the supreme and circuit courts some of its judicial power in the territory, placed certain restrictions on that power, made the exercise of that power subject to modification or amendment by the territorial legislature or by Congress, provided for the appointment of judges for these courts, and fixed their salaries and terms.

The power of the territorial legislature to modify or enact laws is limited to the enactment of laws consistent with the laws and Constitution of the United States; the exercise of judicial power by the supreme and circuit courts is subject to modification by Congress; the laws of Hawaii continued in force by the terms of the Organic Act were only those consistent with the laws and Constitution of the United States. Thus Congress in the Organic Act provided a continuing, ever existent standard for the exercise of power delegated by it to the territorial legislature and courts.

Where in this scheme provided by Congress is the autonomy of a state touted by Appellees?

There is one, and only one, definitive way for Congress to manifest an intent to bestow "autonomy" on the territory: the adoption of a statehood enabling act.

The economic oligarchy in the territory was quite complacent and satisfied—until 1937—with the territorial status they wrought, after their revolution, with

annexation. It is true that anti-trust laws applied internally within the territory, unlike in states, but these laws were not enforced. Although noxious national labor legislation, such as the Clayton Act, the Railway Labor Act, the National Industry Recovery Act and the National Labor Relations Act were extended to and applied internally in the territory, unlike in states, such successful methods of combating labor organizations had been perfected that few labor organizations existed to claim the benefit of these laws.[1] It was not until the Sugar Act of 1937 which discriminated against territories in favor of states and provided for wage determinations by the Secretary of Agriculture[2] that Congress jolted the economic oligarchy into a realization that a territory's privilege is held at the sufferance of Congress. Shock and anger caused a reversal in the 37-year old opposition to statehood.

The Supreme Court of the territory in *Makainai v. Goo Wan Hoy,*[3] expressed its insight into the true status of the territory in contrast with a state much earlier than 1937:

---

[1]See Appendix A. Congress was not unaware of the oppression of workers and employer-interference with the right to organize. In Appendix A are set forth excerpts from reports made to Congress pursuant to the Organic Act relative to conditions of labor in the Islands. It will be clear to the court from these reports that if any group of workers ever needed protection, workers in Hawaii did.

[2]Labor Conditions in Hawaii, 1939, 76th Congress, House Document 848, the wage determination in the sugar industry for 1939 is reported as $1.40 per day for males and $1.05 for females. "These determinations," it is said, "have been an important cause of the rise of wages on sugar plantations since 1936." (p. 40.)

[3]14 Haw. 607, 609 (1903).

> * * * The state, being an independent sovereignty within its sphere, makes its own constitution and laws, creates its own courts and fixes their jurisdiction; while a territory, being a political dependency under absolute control and dominion of Congress, its organic law is made by Congress and *its courts and their jurisdiction and procedure is defined by the same power.* (Italics ours.)

Congress specifically provided in the Norris-LaGuardia Act that its provisions are binding on every "court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress." The lower court is apparently more reluctant to acknowledge the source of its power than its predecessor court in the *Makainai* case.

Appellees, in Gertrude Stein fashion, urge that Congress meant by its definition that court of the United States means court of the United States which has a well-defined meaning which is court of the United States. The simple, clear, explicit words "whose jurisdiction has been or may be conferred or defined or limited by Act of Congress" mean nothing, nothing, nothing at all. Congress, Appellees in essence urge, just doesn't know its own power.[4]

Surely these words are, in the language of *Mookini v. United States,*[5] "an addition expressing a wider connotation".

---

[4]See Act of August 24, 1937, 50 Stat. 751, Section 5, where Congress defined "court of the United States" to include "courts of record of Alaska, Hawaii and Puerto Rico." At least in 1937 Congress was aware of its power to confer, define and limit the jurisdiction of territorial courts.

[5]303 U. S. 201, 82 L. Ed. 748.

Surely there is no judicial canon of construction that Congress never intends to use words in their simple and natural meaning.

Even Appellees' premise that the relation of territorial courts to the federal court system is analogous to the relation of state courts to federal courts is erroneous. Appeals from state courts on constitutional issues lie to the Supreme Court of the United States. The territorial courts, however, are integrated into the inferior federal court system, appeals lying from the territorial Supreme Court to the Ninth Circuit Court of Appeals as in the case of appeals from the territorial federal district court.

II.

ALL LAWS OF THE UNITED STATES NOT LOCALLY INAPPLICABLE ARE IN FORCE IN THE TERRITORY; THERE IS NOTHING IN THE NORRIS-LaGUARDIA ACT THAT MAKES IT LOCALLY INAPPLICABLE; NOR WAS THERE AT THE TIME OF THE ADOPTION OF THE NORRIS-LaGUARDIA ACT ANY TERRITORIAL LAW WITH WHICH ITS PROVISIONS WERE INCONSISTENT, OR IN CONFLICT.

By virtue of the provisions of Section 5 of the Organic Act, *supra,* that all laws of the United States not locally inapplicable are in force in the territory, it is logical to assume that some provision in the Norris-LaGuardia Act manifesting an intention to make the act inapplicable would be required.

Appellees' hysterical contention that an intention to overthrow local autonomy (which, as we have seen, does not exist) must be found in the Norris-LaGuar-

dia Act discloses their violent allergy to the Act and its purposes. They assume that a so-called court of equity cannot exist unless it has inherent power to strike at the very heart of the rights of labor which Congress was endeavoring to protect. They overlook the fact that at the time of the passage of the Act by Congress, eleven states had already limited the power of their courts to issue injunctions in labor disputes,[6] and that others subsequently adopted such acts. At the latest report both state and federal courts in these areas were still in existence.

Appellees overlook the fact that prior to the Act many eminent legal scholars, as well as judges, had branded the issuance of labor injunctions a spurious exercise of equity jurisdiction.[7]

Certainly Congress itself made it plain that it believed equity courts did not have the power which they assumed to exercise for the benefit of employers in industrial disputes.

Thus the Senate Judiciary Committee[8] in reporting the Norris-LaGuardia Act to the Senate stated:

---

[6]72nd Congress, House of Representatives, Report No. 669, Report to accompany H.R. 5315, Define and Limit the Jurisdiction of Courts Sitting in Equity.

[7]Frankfurter and Greene; *The Labor Injunction,* pp. 199-205. And see statement of Frankfurter, J.; dissenting opinion (on a different point) in *Mayo v. Canning,* 309 U. S. 310, where he comments: "The withdrawal of the injunction from industrial controversies made by the Norris-LaGuardia Act was in no small part due to the belief by Congress that experience had shown that the use of a legal remedy devised for a simple situation might in a totally different environment become a perversion of that remedy."

[8]72nd Congress, 1st Session, Senate Report No. 163, Report to accompany S. 935. See excerpts from Report set forth in Appendix B.

> There can be no question, therefore, that there has been created, as a result of writing law into injunction orders and then enforcing those orders by the same judge who wrote them without a grant of trial by jury, that condition of uniting the two powers of making and enforcing laws in one person or one body of men wherein, using the language of Blackstone, "there can be no public liberty."
>
> It is difficult to see how any civilized people could indefinitely submit to such tyrannical procedure. It is not difficult to understand how such cruel laws, made not by any legislature but by a judge upon the bench, should bring our Federal courts into disrepute. Neither is it difficult to see how such injunctions, violating the conscience of civilization, should frighten persons against whom such injunctions are issued into desperation. What free American citizen is willing to submit to the violation of his sacred rights of human liberty and freedom?

The rule Appellees attempt to invoke—that an intention to repeal local law or an implied repeal of a prior law will not be presumed—has no application here.

Appellees set forth in full in Appendix A to their Answering Brief the territorial statutes dealing with the equity jurisdiction of circuit courts. By section 9648 of Revised Laws of Hawaii, circuit judges at chambers are given power

> * * * to hear and determine all matters in equity.

Section 12402 provides that they

> * * * shall have full equity jurisdiction, according to the usage and practice of courts of equity in all other cases where there is not a plain, adequate and complete remedy at law.

Equity jurisdiction as used in these statutes is a general concept. The rules invoked by plaintiffs have application to specific laws which on their face cannot be harmonized or cannot co-exist.

If the concept of "equity" were inviolate and immovable, Congress would have had no power to change it, for Article III of the Constitution provides that the judicial power "shall extend to all cases in Law and Equity;" nor could state legislatures remold the concept of equity jurisdiction when state courts are endowed with equity power by the State Constitution. Yet neither the Supreme Court nor state courts found any difficulty in sustaining legislation against anti-labor injunctions, and to uphold the power of the legislative body to establish a public policy against intervention of equity courts in labor disputes.

III.

THE HISTORY OF THE NORRIS-LaGUARDIA ACT AND ITS SPECIFIC PROVISIONS INDICATE THAT CONGRESS INTENDED THAT IT SHOULD BE GIVEN FULL FORCE AND EFFECT WHENEVER CONGRESS HAD THE POWER TO MAKE IT EFFECTIVE.

It is difficult to conceive how Appellees could have so carefully combed the Congressional Reports and

Congressional debates for references to "federal courts" without grasping an inkling of what Congress was trying to do in the Norris-LaGuardia Act. Appellants have set forth almost in full[9] the report of the Senate Committee because it expresses so conclusively the legislative condemnation of the substantive evil which had developed in labor injunctions and the various manners and means which Congress devised to insure the discontinuance of these evils, both by safeguarding the rights invaded by these evil practices and removing the power of courts subject to its jurisdiction to further perpetuate the evils or violate the rights.

The Senate Judiciary Committee reporting the bill declared:

> The primary objective of the proposed legislation is to protect labor in the lawful and effective exercise of its conceded rights—to protect first, the right of free association and, second, the right to advance the lawful objectives of association.

And again in respect to the public policy:[10]

> It is believed that the public policy of the United States thus declared is free from any possible objection and fundamentally beyond criticism if we desire to give those who labor equal oppor-

---

[9]Appendix B. The first eight and a half pages only are omitted. This portion deals with technical corrections recommended by the committee in the Bill as introduced, the history of this and previous similar bills before the Senate Judiciary Committee, a reprinting of the bill itself, and the pledges of both the Republican and Democratic parties for the passage of such a bill.

[10]See *U. S. v. Hutcheson,* 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 788, where Supreme Court lays down proper interpretation and scope of public policy declared in the Act.

tunities in the economic world with the employers of labor.

And in respect to the legislative definitions contained in the Act, which are here so heatedly controverted:

> Section 13 of the bill defines various terms used in the act, and it is not believed that any criticism has been or will be made to these definitions.
>
> The main purpose of these definitions is to provide for limiting the injunctive powers of federal courts only in the special type of cases commonly called labor disputes, in which these powers have notoriously extended beyond the mere exercise of civil authority and wherein courts have been converted into policing agencies devoted in the guise of preserving peace, to the purpose of aiding employers to coerce employees into accepting terms and conditions of employment desired by employers.

When the Congress passes legislation to remedy evils "which have become intolerable" and which are "violations of sacred rights of human liberty and freedom" and involuntary servitude, can it be presumed that Congress intended to permit continued oppression by courts and employers in the territories where it has power to remove them?

In every enactment affecting labor, that most sensitive national problem,[11] Congress has exercised its plenary power to legislate for the territory—in the Clayton Act (1912), the Railway Labor Act (1926),

---

[11] *U. S. v. Hutcheson,* supra.

both of which preceded the Norris-LaGuardia Act (1932), and the National Industrial Recovery Act (1933) which closely followed it, and the National Labor Relations Act (1935).

The cancer Congress sought to tear out by the roots has gained a critical hold in the territory: in three strikes involving from two hundred workers to twenty thousand workers and thousands of acres of plantation property, sweeping *ex parte* injunctions restraining the approximately one hundred thousand members of an international union and all persons in concert with them from mass picketing or congregating in crowds (usually specified as three) have been issued.

The *ex parte* order issued by the defendant judge limited pickets to three (R. 38). It reminds of the very worst features of the worst injunctions that gave rise to the demand for reform and motivated Congress in adopting the Norris-LaGuardia Act.[12]

---

[12]The injunction of Judge Benson Hough issued against the United Mine Workers in the 1927 strike is set forth in full at pages 264-269 of *The Labor Injunction* as being typical of one of the worst restraining orders issued by federal courts.

There the court limited picket posts on or adjacent to the public highways leading to the mines to three persons at a post. Judge Hough expressed in words the psychology apparent in Judge Wirtz's order: "Persuasion in the presence of three or more persons congregated with the persuader is not peaceful persuasion, and is hereby prohibited."

IV.

A CIRCUIT COURT OF THE TERRITORY, WHICH IS A CREATURE OF CONGRESS EXERCISING POWER DELEGATED BY CONGRESS, CANNOT ENJOIN THE EXERCISE OF RIGHTS SPECIFICALLY MADE LAWFUL BY ACT OF CONGRESS.

It is axiomatic that a court of equity cannot enjoin lawful activity.

The Senate Judiciary Committee shows conclusively that the bill was intended to protect substantively the rights which it made unenjoinable. The Committee cites with approval the holding of the Supreme Court in *Texas Railway v. Brotherhood,* 231 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034, where the court held that conduct by employers prohibited under that act was enjoinable, even though no procedural remedy for the protection of the substantive right had been provided by Congress.

The discussion of the various provisions of the bill contained in this Report shows that Sections 1-6 dealt with substantive rights and defined the allowable scope of conduct. Sections 7-10 are classed as procedural sections. Sections 11 and 12 confer rights in contempt cases.

Appellees' triumphant argument that that Section 10, providing a right of appeal to the circuit courts, shows conclusively that the Act was intended to apply only to federal district courts, is an attempt to elevate the procedural provisions above the substantive rights. The Supreme Court has never let a substantive right

fail for want of a remedy or because of an inexactly created remedy.[13]

V.

CONTEMPT PROCEEDINGS WILL NOT LIE FOR VIOLATION OF AN ORDER WHICH THE COURT CLEARLY HAD NO JURISDICTION TO ISSUE.

The Norris-LaGuardia Act, Appellants contend, clearly and unequivocably by its terms applies to the territory. Until the *ex parte* order involved in the instant case, the application of the Act to the territory was not questioned. In a circuit court decision rendered in *Neves v. Reber* (1938) by Le Baron, J., the Act was declared to be a limitation on the power of territorial circuit courts. From that date uptil the 1946 sugar strike, no challenge of the application of the Act was made.[14]

This is the first time the question has ever reached this court.

If, as Appellants contend, the Act clearly applies, the principle which Appellees contend the *Lewis* case[15] establishes has no application.

Appellees' eagerness to brush aside former authoritative holdings of the Territorial Supreme Court

---

[13]See *Texas Railway v. Brotherhood,* supra, and *U. S. v. Hutcheson,* supra. See also Appendix B.

[14]The question was raised before the federal district court in a civil rights suit, *Alesna v. Rice* (Appellees' Answering Brief, Appendix III) in relation to another ex parte injunction issued by another circuit court judge who refused to stay felony proceedings for contempt pending the outcome of this case.

[15]*United States v. United Mine Workers,* 330 U. S. 258.

holding that contempt will not lie for violation of a void order, and their eagerness to adopt what they allege is now the federal rule seems somewhat inconsistent with their local autonomy thesis.

CONCLUSION.

Appellants believe that the Norris-LaGuardia Act—which after all is only a statutory sanction of the best and long established practice in equity[16]—is applicable to the Territory and binding on its circuit courts.

Dated, Honolulu, T. H.
March 1, 1948.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
HARRIET BOUSLOG,
MYER C. SYMONDS,
By HARRIET BOUSLOG,
GEORGE R. ANDERSEN,
Attorneys for Appellants.

---

[16]Senate Judiciary Report, Appendix A; Pomeroy, *Equity Jurisdiction* (4th edition), Sec. 1685.

(Appendices A and B Follow.)

Appendices.

Appendix A

Labor Conditions in the Territory of Hawaii, 1929-30, U. S. Department of Labor, Bulletin No. 534 of the Bureau of Labor Statistics:

"Labor organizations in the Hawaiian Islands are few in number, small in membership, and with the exception of the barbers' union, have no agreements with the employers." (p. 117.)

Labor in the Territory of Hawaii, 1939, 76th Congress, 3d Session, House Document No. 848, Bulletin No. 687, United States Department of Labor, Bureau of Labor Statistics:

"The high degree of intercorporate control makes it impossible to mobilize the resources of all large enterprises to restrict the growth of labor unions and to combat strikes in whatever fields of industry they may occur. There is a tendency on the part of management to assume that unionism is synonymous with dangerous radicalism, possibly because the labor movement in Hawaii has not always been wisely led. The result of this attitude is the feeling that labor unionism is a common menace to all Hawaiian enterprise, and that the duty of combating its development is a common problem of the management of all industries whenever labor trouble occurs. Thus, although management has done much for labor in Hawaii, it has used every influence at its command to restrict labor organization.

* * * * * * *

"The position of the individual plantation worker is especially vulnerable. The house in which he lives, the store from which he buys, the fields in which he finds his recreation, the hospital in which he is treated, are all owned by plantation management, which in turn has its policies controlled from the offices of the factors in Honolulu.

"Whether it is justified or not, there is a prevalent feeling among the majority of Hawaiian workers that a bad record with any important concern in the Territory makes it difficult to obtain employment in any other concern, and that to be associated with labor union activities is certain to weaken their employment opportunities, if not destroy their economic future." (p. 198.)

* * * * * * *

"In comparison with the highly integrated character of industrial management, the organization of labor in the Territory is meager.

"To understand the development of labor organization in Hawaii, it is necessary to remember that in less than 70 years the population has increased from 56,000 (in 1872) to well over 400,000 * * *" (p. 199.)

"The total membership of all unions in the Territory has been increasing. Accurate figures are not available. Estimates of total membership by union officials vary from 3,500 to 6,000 members. Even if the larger figure is accepted as accurate, it would indicate that less than one twenty-fifth of the gainfully employed are unionized." (p. 203.)

Appendix B

Excerpts from

72d Congress, 1st Session — SENATE — Report No. 163

TO DEFINE AND LIMIT THE JURISDICTION OF COURTS SITTING IN EQUITY.

February 4, 1932.—Ordered to be printed.

MR. NORRIS, from the Committee on the Judiciary, submitted the following

REPORT.

(To accompany S. 935)

* * * * * * *

The injunction process is an extremely harsh remedy. Particularly is this true when a restraining order is issued without any notice to any of the defendants; and in nearly every case in a labor dispute where an injunction is issued, the restraining order is the first step. The first knowledge which the defendant has is service of notice upon him that the restraining order has already been issued. Before he is given an opportunity to be heard, he is enjoined, and in most cases he is restrained from doing acts and things which seriously interfere with, and sometimes completely deny, his fundamental right of liberty of action which belongs to every free citizen.

That there have been abuses of judicial power in granting injunctions in labor disputes is hardly open

to discussion. The use of the injunction in such disputes has been growing by leaps and bounds.

It is impossible to report with accuracy the number of injunctions issued in either the State or Federal courts in connection with labor disputes in recent years. Only a small percentage of these injunction cases are reported officially. For example, approximately 300 were issued in connection with the railway shopmen's strike of 1922, but only 12 were officially reported (Frankfurter on "The Labor Injunction," p. 52).

In testimony before the committee the president of the American Federation of Labor submitted a partial list of 389 labor injunctions in State and Federal courts during the last decade, most of which are unreported. (Hearings, February, 1928, pp. 77-86.) Out of over 260 cases listed by the Massachusetts Bureau of Statistics in the period of 1898-1916, only 18 were officially reported. (p. 51.) A large majority of injunction proceedings are never carried beyond a restraining order or temporary injunction and, therefore, are unlikely ever to reach the stage of official reporting, which is concerned largely with final decrees and with decisions of appellate courts. Therefore, exact statistics can not be presented, but the statement can be safely made that since 1890, when labor injunctions were practically unknown, their issuance has steadily increased until there are few controversies of substantial importance between employers and employees in which one or more injunc-

tions will not be issued out of either a State or a Federal court.

The right of wage earners to organize and to act jointly in questions affecting wages, conditions of labor, and the welfare of labor generally is conceded and recognized by all students of the subject. An increasing necessity for the organization of labor has been brought about by modern economic conditions and methods of doing business, which have in the main been developed by the aid of governmental authority.

It is obvious that existing conditions under which large employers of labor possess unprecedented power to dictate contracts and conditions of employment have been developed through governmental grants of authority to form corporations and organizations of corporations, whereby thousands of owners of property are enabled to combine hundreds of millions of dollars of capital and, in this way, substantially to control and sometimes to monopolize opportunities for employment. Such a power, unrestrained by the organization of labor, would permit employers arbitrarily to fix the wages and conditions of labor under which millions of men and women would find their only opportunity to earn a living.

A single laborer, standing alone, confronted with such far-reaching, overwhelming concentration of employer power, and compelled to labor for the support of himself and family, is absolutely helpless to negotiate or to exert any influence over the fixing of his wages or the hours and conditions of his labor. A man

must work in order to live. If he can exercise no control over his conditions of employment, he is subjected to involuntary servitude.

The efforts of the workers to preserve their freedom of association and their freedom in association to influence the fixing of wages and working conditions present questions which are unique and demand specific legislative action. The situation has been very well described by Chief Justice Taft in the opinion of the court delivered by him in American Foundries v. Tri-City Council (257 U. S. 184, at p. 209), reading in part as follows:

> * * * Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. * * * They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. * * * The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend be-

> yond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood.

The foregoing opinion is cited with approval in the unanimous opinion of the Supreme Court handed down May 26, 1930, in Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks, in support of the following statement in the opinion of Mr. Chief Justice Hughes:

> "The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. (Citing the Tri-City case.) Congress was not required to ignore this right of the employees, but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife.

If we concede, as we must, that labor has the right to combine for the lawful purpose of securing employment and has likewise the right to combine for the purpose of securing increased wages or bettering conditions of labor, then it follows, as the late Chief Justice Taft has so well stated, that the strike becomes a lawful instrument in the economic struggle between employer and employee. It would be hy-

pocrisy, however, to concede these rights to labor and then to prohibit any effective exercise of these rights by labor. The primary object of the proposed legislation is to protect labor in the lawful and effective exercise of its conceded rights—to protect, first, the right of free association and, second, the right to advance the lawful object of association.

No one will seriously doubt the right of Congress, under the Constitution, to limit the jurisdiction of Federal courts. The jurisdiction, for instance, of the district courts of the United States is given by act of Congress. All the courts of the United States except the Supreme Court could be entirely abolished by act of Congress, and, while Congress could not give to these inferior courts jurisdiction greater than is provided by the Constitution, it could, on the other hand, within the limits of the Constitution, give to the inferior courts such jurisdiction as Congress in its wisdom deems just. It follows, also, that having given this jurisdiction, it can, by act of Congress, take away all or any part of it. This has been clearly held by the Supreme Court of the United States in Myers v. United States (272 U. S. 52). At page 130 the Supreme Court said:

> * * * It is clear that the mere establishment of a Federal inferior court does not vest that court with all the judicial power of the United States as conferred in the second section of Article III but only that conferred by Congress specifically on the particular court. It must be limited territorially and in the classes of cases to be heard; and

> the mere creation of the court does not confer jurisdiction except as it is conferred in the law of its creation or its amendments.

In an earlier case the Supreme Court held:

> The judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. (Cary v. Curtis, 3 How. 235 (U. S.) at 244.)

In a fairly recent case, the Supreme Court, construing the power of the inferior federal courts to exercise jurisdiction over controversies between citizens of different states, pointed out that:

> The right of a litigant to maintain an action in a Federal court (on this ground) is not one derived from the Constitution of the United States, unless in a very indirect sense.

And continued:

> Certainly, it is not a right granted by the Constitution. * * * The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. * * * A right which

> thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, can not well be described as a constitutional right. (Kline v. Burke Construction Co., 260 U. S. 226, 233.)

PUBLIC POLICY.

Relief by injunction is an extraordinary and harsh remedy. It should not be resorted to except in cases where such action is imperatively demanded; and yet injunctive relief is often the only adequate and effective relief against many wrongs and to prevent many irreparable injuries in controversies of infinite variety.

It is not sought by this bill to take away from the judicial power any jurisdiction to restrain by injunctive process, unlawful acts or acts of fraud or violence. In order to assist the courts in the proper interpretation of the proposed legislation, it has been attempted to declare, by act of Congress, the public policy of the United States in relation to labor disputes and the issuing of injunctions in connection therewith. This is done in section 2 of the proposed substitute bill, as follows:

> * * * Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of

> contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

It is believed that the public policy of the United States thus declared is free from any possible objection and fundamentally beyond criticism if we desire to give those who labor equal opportunity in the economic world with the employers of labor.

In the case of Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks, decided May 26, 1930, previously quoted, the court had under consideration the provision of the railway labor act, confirming in railway employees the right of self-organization "free from the interference, influence or coercion" of employers. It will be noted that this right of employees, written into the railway labor act, is the same right which is affirmed in the declaration of public policy in the proposed bill, which affirms, in section 2, the employee's "full freedom of association, self-organization and designation of representatives of his own choosing," and provides that

the employee "shall be free from the interference, restraint, or coercion of employers of labor." Therefore, the decision of the Supreme Court of May 26, 1930, sustaining the constitutionality and the enforceability of this right of employees under the railway labor act, directly and conclusively sustains the constitutionality of the declaration of policy in the proposed bill and the provision of the proposed bill making contracts contrary to such public policy nonenforceable in the federal courts. In this most recent opinion, the Supreme Court held:

> Such collective action (of employees) would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.

It is also equally clear that the Congress has the right to declare the public policy of the United States so long as the policy thus declared does not conflict with the Constitution.

Where Congress has not declared the public policy it is within the province of the court to decide what the public policy is, but when such public policy has been declared by Congress it is the duty of the courts to follow such policy and to decide litigated questions related thereto in accordance with the public policy thus declared.

In the case of the People v. City of Chicago (321 Ill. 466-475) the Supreme Court of Illinois said:

> The public policy of a State is to be found embodied in its constitution, its statutes, and, when these are silent on the subject, in the decisions of its courts. The public policy of the State, when not fixed by the Constitution, is not unalterable but varies upon any given question with changing legislation thereon, and any action which, in the absence of legislation thereon, by the decisions of the courts has been held contrary to the public policy of the State, is no longer contrary to such public policy when such action is expressly authorized by legislative enactment.

Another Illinois case on this subject is Union Trust & Savings Bank v. Telephone Co. (258 Ill. 202). The Supreme Court of Illinois said:

> While no statute has been enacted declaring such exclusive contracts criminal or giving a right of action to persons prejudiced by them, the courts have declared the public policy of the State, in accordance with the common law, to be opposed to such contracts which tend to put the power to render public service in the hands of one corporation and to take it away from all others. The legislature has the power to change this policy. It is a legislative question whether the public interest will be promoted by monopolistic rather than competitive service.

Chief Justice Marshall, in the case of McCulloch v. Maryland (4 Wheat. (U. S.) 315, 423), used the following language:

> Where the law is * * * calculated to affect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

The Supreme Court has expressly upheld the jurisdiction of Congress to declare the public policy of the United States in the case of Michaelson v. United States (266 U. S. 42, 68). In that case, the following language was used:

> The words of the act are plain and in terms inclusive of all classes of employment; and we find nothing in them which requires a resort to judicial construction. The reasoning of the court below really does not present a question of statutory construction, but rather an argument justifying the supposititious exception on the ground of necessity or of policy—a matter addressed to the legislative and not the judicial authority.

The decisions and opinions of the Supreme Court of the United States in Bailey v. Alabama (219 U. S. 219) are significant in this connection. In that case the majority of the court held that a statute although in terms punishing a man for fraud in violating a contract to work, had the "inevitable effect" of convicting him of a crime in simply refusing to work and thus enforced peonage. This was held to be unconstitutional, in conflict with the thirteenth amendment, which was intended, as held in the majority opinion by Mr. Justice Hughes:

> * * * to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude.

The opinion further stated:

> There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based.

It is noteworthy in this case that the dissenting opinion by Mr. Justice Holmes proceeded on the ground that the contract in question (to render services in consideration of an advance payment) was in itself a legal one, and that therefore a man could be legally punished for obtaining money by making such a contract with a fraudulent intention of breaking it. He met the argument that the enforcement of such contracts would result in peonage by the pertinent comment: "If the contract is one that ought not to be made, prohibit it." Thus both opinions already support the right of Congress to declare contracts resulting practically in involuntary servitude to be contrary to public policy and to deny their enforceability or validity in the federal courts.

The declaration of a public policy is not new to the Congress of the United States. Such a policy is explicitly declared in the present railway labor act, as previously noted. In this connection, it is exceedingly interesting to trace the history of that act. Originally, in the transportation act, it was provided that disputes between employers and employees should, if

possible, be "decided in conference between representatives designated and authorized so to confer." In administering this law the labor board found great difficulty on account of the interference by employers with the free designation of representatives by the employees. The chairman of the board appeared before the Interstate Commerce Committee of the Senate and explained the trouble. (See Hearings, Interstate Commerce Committee of the Senate on S. 2646, 68th Cong., 1st sess.) On account of this difficulty, the present railway labor act included this specific provision:

> Representatives, for the purposes of this act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other. (Par. 3, sec. 152, title 45, U. S. C. A., 1929 sup.)

This act definitely declared the same public policy in regard to railway employees as is declared in the proposed bill in regard to all employees, and this provision of the railway labor act has been sustained by the United States Supreme Court in Texas & New Orleans Railroad Co. v. Brotherhood of Railroad & Steamship Clerks, decided May 26, 1930, as previously cited.

Another instance in which Congress declared the public policy of the United States is found in section 15a of the interstate commerce act, passed as a part

of the transportation act of 1920. The language referred to in that act is as follows:

> Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States. (41 Stat. 489.)

The declaration by Congress of the public policy thus declared was interpreted and sustained by the Supreme Court of the United States in the case of Dayton-Goose Creek Railway v. United States. (263 U. S. 456.) The opinion of the court in this case shows that the act was interpreted and sustained upon grounds of the public policy thus declared by Congress. The court in that case said:

> The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. * * * To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the commission.

> Title IV of the transportation act, embracing paragraphs 418 and 422, is carefully framed to achieve its expressly declared objects.

The public policy of the United States in regard to disputes between labor and employers of labor, having been declared as provided in the proposed bill, it will become the duty of the courts to carry out this policy and to uphold it in passing upon any litgated questions which may arise under the act. Such a declaration of public policy should be of great assistance to the courts in the adjudication of any controversies which may arise.

THE "YELLOW DOG" CONTRACT.

One of the very serious difficulties which has arisen in many of the injunctions which have been issued in labor disputes has been the so-called yellow-dog contract. This contract is one which requires the employee, as a condition of obtaining employment, to agree that he will not join a union while he is in such employment, or, that if he is then a member of a union, he will disassociate himself from it; that he recognizes the right of the employer to discharge him without notice; that he will not quit without giving to his employer notice sufficient to enable the employer to hire some one to take his place. Such contracts frequently require the employee to agree in advance to accept such conditions of labor, hours of labor, etc., as may from time to time be decided upon by his employer. Not all of these contracts are the same, but,

in general, the conditions are such as those which have been briefly outlined. In all of them the employee waives his right of free association and genuine representation in connection with his wages, the hours of labor, and other conditions of employment. In other words, he surrenders his actual liberty of contract and to a great extent he enters into involuntary servitude. Yet the Supreme Court has held very recently that "collective action would be a mockery if representation were made futile by interference with freedom of choice." (Texas & New Orleans case previously cited.)

It is no defense to say that he is not compelled to sign a contract, as is so clearly pointed out in the citation from Chief Justice Taft heretofore quoted. He is helpless in dealing with his employer. This was not always true. It is only under modern conditions where under the law, employers organize; where large corporations control labor in an entire line of industry. He is dependent upon his daily wage and so is his family. Therefore, he must accept whatever wages and whatever conditions are laid down by the employer. He has no other course to pursue. Union on his part with his fellow workers is absolutely necessary to protect his own liberty and, if he signs away this right, to a great extent he becomes the slave of his master.

In sustaining the right of railway employers to organize the Supreme Court held:

> Congress was not required to ignore this right of the employees but could safeguard it and seek to

> make their appropriate collective action an instrument of peace rather than of strife. (Texas & New Orleans case previously cited.)

This doctrine upholds the purpose of the proposed bill.

One of the objects of this legislation is to outlaw this "yellow dog" contract. It has become necessary for Congress to take some action in regard to these contracts, because many of the injunctions which have been issued by federal courts have been based wholly or in part upon such contracts on the assumption that they are valid and not contrary to public policy.

At first blush it would seem unnecessary to pass any legislation upon the subject, because it is difficult to see how any court could sustain such a contract even though there were no statute condemning it. Many of the most eminent jurists have always believed that such contracts were void for several reasons.

First. They are contrary to public policy. If these contracts are held to be legal in one type of litigation, it would follow that they must be held legal in all other controversies, and thus in order to sustain life and support families, laboring men may be compelled to enter into practical peonage. If men must agree in advance to surrender any real liberty of contract in order to attain employment they are, under coercion of necessity, forced into working under conditions of involuntary servitude.

Second. These contracts should be held void because they are entered into without consideration. The employer on the one hand has his work which he wants done. The laborer on the other hand, as a consideration for his part of the contract, undertakes to perform the labor. In practically every case there is no hiring for a definite period; no assurance of either work or fixed wages. The employer gives up none of his freedom of action and furnishes no consideration for the promise of the employee that he will surrender ordinary rights of "liberty of contract" which are inherent in every free citizen.

Third. Such contracts should be held void because they are signed by the employee under coercion. The employee is forced to accept all of these burdensome conditions in order to support himself and family, because no man will voluntarily deprive himself of his power of self-protection.

Nevertheless, since such contracts have been held by the courts to furnish a legal basis for preventing employees from organizing for self-help, it seems to be necessary that some legislative action should be taken to liberate workers from a servitude thus imposed. The bill declares that such contracts are:

> * * * contrary to the public policy of the United States, shall not be enforceable and shall not afford any basis for the granting of legal or equitable relief by any court of the United States.

One of the indefensible things contained in a great many of the injunctions issued by federal judges is the enjoining of any person, organization, or corporation from paying benefits to laborers who are engaged in carrying on a strike. As a rule, labor unions provide for a fund out of which they pay benefits to their members who are out on a strike. These injunctions prohibit them from paying such benefits, although the accumulation of this fund has been in part contributed by the very men who are on a strike and under the rules of the union they are, as a matter of fact, entitled to these benefits.

Some of these injunctions go still further. They not only prohibit the unions from paying any strike benefits to men who are on a strike, but they prohibit any person, whether a member of the union or not, from in any way giving any assistance to the persons who are on the strike. It is a common thing, in the operation of coal mines, for the owners of the mine to own the houses in which the laborers live. They make a contract with the laborer for the rental which shall be paid, providing also for the surrender of the premises under conditions named in the contract of lease.

If a dispute arises between the employer and the employee as to whether the contract has been violated and as to whether the owner is entitled to dispossess the employee, the question becomes one of forcible entry and detainer under the laws of the state where the property is located. These laws usually, if not

always, provide for the trial of forcible entry and detainer cases before an inferior court. Either side, being dissatisfied with the decision of the court, has the right to take an appeal. If the appeal is taken by the tenant he must put up a bond, not only to pay the costs, but to pay a reasonable rental for the property in case the decision in the higher court is against him. This is a right given him under the state law. The state law is general and applies to every one. It is the only means by which the question in dispute between landlord and tenant can be fully decided. If a tenant is wrongfully withholding the property the landlord is protected by the bond which the tenant must give providing for the payment of rental if the case shall ultimately be decided against him. Yet, strange as it may seem, federal judges have been in the habit of issuing injunctions restraining outsiders —usually the term used is "any person whomsover"— from doing anything to assist the laborer in a forcible entry and detainer case pending in the state court.

All persons are enjoined from furnishing bonds to take those cases up on appeal. All persons are enjoined from paying any money in the way of expenses in connection with such litigation in the state courts. The injunctions often go far enough to prevent an attorney from giving any advice to the employee who is trying to hold possession of a house belonging to the employer. All persons are restrained from giving them any assistance while they are living in these houses, including food and fuel. When the judges of the United States, by extending the extraor-

dinary remedy of the injunction, should prohibit laboring men from litigating in state courts, under the law of the state, to sustain what they claim to be their rights, is almost beyond human comprehension. In truth, such a summary method of depriving persons of their "day in court" has never been held to be "due process of law" in any other class of cases.

The bill, under section 4, takes away from all federal courts the power to issue such injunctions. It also, in the same section, prohibits the issuing of injunctions which restrain employees from—

> * * * assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.

It prohibits federal courts from issuing injunctions restraining anyone from inducing or advising without threat, fraud, or violence, any of these things regardless of whether the employee may have signed the so-called "yellow dog" contract.

Section 4 also prohibits the granting of injunctions which would restrain strikers from giving publicity to the existence of or the facts involved in a labor dispute. One of the most recent injunctions in a labor dispute was issued in the District Court of the United States for the Northern District of Iowa. This injunction was issued on the 29th day of March, 1930, enjoining the defendants, among other things, from—

> * * * printing, publishing, issuing, circulating and distributing or otherwise communicating, directly or indirectly, in writing or verbally to any person,

association of persons, or corporation, any statement or notice of any kind or character whatsoever, stating or representing:

(1) That there is a strike at the mill or plant of complainant at Fort Dodge, Iowa; or that the strike of 1921 is still in existence; or that there is a controversy over wages or conditions of employment between complainant and its employees; or any false statement with reference to conditions of employment at complainant's plant.

(2) That complainant is unfair to organized union labor, or that its products are or were unfair to organized labor, or are on an unfair list.

(3) That complainant forces or requires its employees to sign or subscribe to the so-called "yellow dog" contract.

The defendants in this case, it will be observed, were not allowed to tell anyone that a strike was in progress. They were not allowed to give any publicity in any way to the fact that a strike existed. They were not allowed to tell anyone that the complainant required its employees to sign the "yellow dog" contract. In other words, their mouths were absolutely closed and "free speech" was forbidden. They could not, without violating this injunction, have sought advice from an attorney. The son would not be allowed to seek advice from his own father. And if the defendants violated this severe decree they would be liable for contempt of court, which means that they would be tried for an offense made illegal by the judge—an offense consisting of an act which

would be perfectly lawful under the laws of the state where the controversy existed. They were not only forbidden to violate this judge-made statute, but, in case they did violate it, they would be tried by the man who made the statute. They would not be allowed a trial before a jury of their peers—a privilege granted to the vilest of criminals.

It has long been recognized by students of law and government that the power to make law and the power to enforce law should be separated as a protection against tyranny. To prevent executive tyranny, the legislative power has been carefully separated from the executive power in our scheme of government and to prevent judicial tyranny it is equally necessary to preserve the separation of the legislative power from the judicial power.

A warning against the growing exercise of legislative power by the courts in injunction cases was uttered long ago by the great commentator, Blackstone, in the following language:

> In all tyrannical government, the supreme magistracy or the right of making and enforcing laws is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together there can be no public liberty. (1 Blackstone 142.)

It is amazing to realize that in the last 40 years there has developed in the American courts the practice of writing a special law to fit the individual case by judges in issuing labor injunctions; and that thereupon the judge, who himself wrote the law, has under-

taken to prescribe the penalty for its violation and to punish the violator without permitting the accused to enjoy a trial by jury or even to insist upon a trial before another judge. It can not be succcessfully claimed that the courts have not written into these injunction cases a new law of labor disputes, fitting the law to each particular case, and then enforcing this new law made by the court.

Pomeroy, perhaps the leading authority, describes the development of the law compactly in his Equity Jurisprudence in the following language:

> The courts have thus been required to face such questions as the nature and extent of the capitalist's rights in the management of his business and of the workingman's property in his labor; to decide how far the employer shall be protected in his right to have labor and custom flow to him free from the interference of third parties and how far the laborer shall be protected from similar interference in his contract of employment or his rights to secure employment; to determine what limits shall be placed upon the individuals and combinations of individuals in seeking their economic advancement at the expense of their fellows. All these and other problems have come before the courts in rapid succession. (Pomeroy, Equity Jurisprudence (4th Ed.) vol. 5, p. 4566, sec. 2018.)

There can be no question, therefore, that there has been created, as a result of writing law into injunction orders and then enforcing those orders by the same judge who wrote them without a grant of trial by

jury, that condition of uniting the two powers of making and enforcing laws in one person or one body of men wherein, using the language of Blackstone, "there can be no public liberty."

It is difficult to see how any civilized people could indefinitely submit to such tyrannical procedure. It is not difficult to understand how such cruel laws, made not by any legislature but by a judge upon the bench, should bring our Federal courts into disrepute. Neither is it difficult to see how such injunctions, violating the conscience of civilization, should frighten persons against whom such injunctions are issued into desperation. What free American citizen is willing to submit to the violation of his sacred rights of human liberty and freedom?

RESPONSIBILITY FOR UNLAWFUL ACTS.

Section 6 of the bill relates to damages for unlawful acts arising out of labor disputes. It is provided that officers and members of any labor organization, and officers and members of any employers' organization, shall not be held liable for damages unless it is proven that the defendant either participated in or authorized such unlawful acts, or ratified such unlawful acts after actual knowledge thereof.

To hold that officers or members of a labor organization, or the organization itself, should be liable for damages for unlawful acts committed while a strike is on, without clear, actual proof of authorization, par-

ticipation in, or ratification of such unlawful acts, would go far toward the destruction of organized labor.

Moreover, it will be observed that this section, as do most all of the other prohibitive sections of the bill, applies both to organizations of labor and organizations of capital. The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees.

In most cases where strikes occur involving a great many employers and employees and covering a comparatively large territory, there are often unlawful acts committed in the way of injury to property or to persons. It is not the intention of the bill to protect anybody, whether he be employer or employee, from punishment for the commission of unlawful acts either as against property or persons. But no person or organization should be held thus liable unless he or it caused the unlawful act or participated in it or ratified it. It has often occurred that employers themselves have secured the services of detectives who, under the guise of labor men, have gained admission into labor unions. When this happens these detectives are usually doing everything within their power to incite employees who are on strike to commit acts of violence, and such detectives, contrary to the definite instructions of labor union leaders, sometimes commit unlawful acts for the express and only purpose of laying the foundation for injunctive process,

of bringing discredit upon the union, and of making its officers and members liable for damages.

In case of a strike, where the officers of the labor union are doing everything within their power to prevent acts of violence from being committed by any person, the law should fully protect them and save them and the members of their organization who are following their advice from liability in damages because of unlawful acts of persons who are either directly or indirectly connected with those who are trying to defeat the purposes of the strike.

Opposition to this section has been voiced on the ground that it seeks to establish a "new law of agency". In the first place, this section is concerned especially with establishing a rule of evidence. There is no provision made relieving an individual from responsibility for his acts, but provision is made that a person shall not be held responsible for an "unlawful act" except upon "clear proof" of participation or authorization or ratification. Thus a rule of evidence, not a rule of substantive law, is established. "The general power of every legislature to prescribe the evidence which shall be received and the effect of that evidence in the courts of its own government", has been repeatedly upheld by the Supreme Court. (See Fong Yue Ting v. U. S., 149 U. S. 698, 749; Bailey v. Alabama, 219 U. S. 219, 238.)

But the argument is made that a man is held legally responsible for the acts of his agents taken in due course of employment. Thus argument is evidently

based upon a doctrine of the civil law of negligence. It has no application to the criminal law. If a man is held responsible for an unlawful act, his responsibility rests on the basis of actual or implied participation. He is responsible for conspiring to do an unlawful act or for setting in motion forces intended to result, or necessarily resulting in an unlawful act.

> Strictly speaking, the legal relation of principal and agent does not exist in regard to the commission of criminal offenses. All who participate in the commission of such offense are either principals or accessories. (Anderson v. State, 22 Ohio State 305.)
>
> But where the agent's criminal act is unauthorized and is not sanctioned or acquiesced in by the principal, especially where it is contrary to the principal's direct instructions, the latter can not be held criminally responsible therefor. (Clark and Skyles, Law of Agency, Vol. I, p. 1140.)

The distinction should be clear. A man operating a dangerous machine negligently injures someone, and the negligence is imputed to the employer. But, there is a distinction between the torts of an employee and the crime of an employee, and criminal responsibility is not to be imputed. If the president of a corporation sends a bill collector to persuade a debtor to pay a bill, instructing him to collect it in a peaceable manner, he does not become responsible for an assault by his employee upon the debtor.

According to the same reasoning, why should an officer of a labor union, who has specifically advised members that violence must be avoided, become re-

sponsible for the hot-headed action of some member in perhaps assaulting a strike breaker? Again, the relationship between officers and members of labor unions and other members is not that of employer and employee. The officers chosen by a union are not employers of the membership. They have no control over their associates based upon the power of determining whether or not they will employ them. It may be accepted that if a group associated in common activities becomes controlled by a lawless majority, it may be necessary for law-abiding men to dissolve their association with lawbreakers; but the doctrine that a few lawless men can change the character of an organization whose members and officers are very largely law-abiding is one which has been developed peculiarly as judge-made law in labor disputes, and it is high time that, by legislative action, the courts should be required to uphold the long established law that guilt is personal and that men can only be held responsible for the unlawful acts of associates because of participation in, authorization or ratification of such acts. As a rule of evidence, clear proof should be required, so that criminal guilt and criminal responsibility should not be imputed but proven beyond reasonable doubt in order to impose liability.

There has been a distinct conflict of opinion in the courts as to the degree of proof required. Mere ex parte affidavits establishing a certain amount of lawless conduct in the prosecution of a strike have been held in some instances to establish a "presumption" that the entire union and its officers were engaged in

an unlawful conspiracy; and, on the other hand, other courts have declined thus to substitute inference for proof, rejecting such a doctrine in language such as the following used in a New York case: "Is it the law that a presumption of guilt attaches to a labor union association?" Various examples of these different rulings are quoted in The Labor Injunction, by Frankfurter and Greene, pp. 74-75.

It is appropriate and necessary to define by legislation the proper rule of evidence to be followed in this matter in federal courts. That is the only object of section 6.

PROCEDURE.

The bill, in section 7, provides for the procedure which shall be followed in case application is made for a temporary restraining order or for a temporary or permanent injunction. It provides that no temporary or permanent injunction shall be issued except after hearing the testimony of witnesses, under oath, in open court. The court is also required, before it issues a temporary or permanent injunction, to permit the defendants to offer testimony in opposition to such injunction; and, before the court is authorized to issue the temporary or permanent injunction, it must find that unlawful acts have been threatened or committed and will be executed or continued unless restrained; that substantial and irreparable injury to complainant's property will follow, and that as to each item of relief granted greater injury will be in-

flicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief.

This procedure balances the effect of an order upon both parties, and while an injunction might be granted against certain unlawful acts the injury to complainant from such acts can not be made the basis of enjoining other acts from which complainant will suffer but little, but the prohibition of which may cause greater injury to the defendants. This is only statutory sanction of the best and long established practice in equity. (See Pomeroy, Equity Jurisprudence (4th ed.), sec. 1685.)

It is likewise provided in section 7, that in addition to the ordinary requirements applying to all applications for injunction, the court must find—

> That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection.

This is an entirely new provision, but it is believed to be a just one.

These injunctions are issued upon an allegation, among other things that unless the order is issued complainant's property will be injured or destroyed. If the public officers whose duty it is to protect complainant's property are able and willing to give the protection required by law, there is no reason why the courts of equity should take over the functions of the executive department and undertake to police their districts and no reason why the extraordinary and

one-sided remedy of an injunction should be resorted to. It seems, therefore, but fair that before the injunction is issued, the court should find from the evidence that such officers have failed or are unable to furnish the protection required by law.

Injunctions are often applied for and issued for the moral effect that such injunctions will have in disheartening and discouraging employees engaged in a strike, rather than because of any real necessity to protect property.

Provision is also made in the bill for the issuance of a temporary restraining order without notice. This can be done only if the complainant shall allege that such temporary restraining order is necessary and that if time is taken to give notice a substantial and irreparable injury to complainant's property will be unavoidable.

Before issuing such temporary restraining order, however, the court must take testimony under oath, and such testimony must be sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice.

Injunctions issued without notice to the defendants against whom the injunctive order is sought are always ex parte. No good reason exists why this evidence thus taken, without the presence of the defendant, should not be required to be sufficient, if sustained to sustain an order issued after notice and hearing. If the complainant can not make a prima facie case without notice, he certainly never would be

able to make such a case after notice when the defendant was in court contesting the issuing of the injunction.

The bill provides that such temporary restraining order so issued without notice shall not be effective for a longer time than five days. This, however, is a reasonable requirement. The only object in issuing a temporary restraining order without notice is because it is alleged by the complainant that notice of such application would bring about destruction of his property. Therefore, the time that such extraordinary process should be effective without notice should not be prolonged beyond the time that it would take to give notice, and it is difficult for any mind to conceive of a condition where notice could not be given and a hearing held within the 5-day limit.

It is provided in section 8 that no restraining order or injunctive relief shall be granted to any complainant who has not complied with any obligation imposed by law in regard to the settlement of any labor dispute. Neither shall such order issue unless the complainant has made every reasonable effort to settle such dispute, either by the aid of negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration. But where such negotiations are in progress and have not been completed, the court is not required, before issuing the writ, to await the outcome of such action if the court is satisfied that irreparable injury is threatened.

This section simply requires that a complainant shall not be entitled to injunctive relief who has failed

to comply with any legal obligations which may exist, to be performed on his part. In other words, he must go into court with clean hands. This doctrine here announced is that persons have no right to seek the aid of federal courts and impose upon them additional burdens who have not sought to do all within their power to avoid the aid of the courts and who are not themselves agrravating or causing the dispute by violation of legal obligations.

It has often occurred, where employers have refused to confer with their employees, as required by law; or where they have refused to comply with the requirements of the law for the protection of employees, that they have nevertheless sought to have the court restrain the employees from promoting their interests properly in the resulting dispute. An employer who has himself brought on a controversy by wrongful conduct is not entitled to the aid of equity in advancing his interests in the resulting conflict.

> A court of equity acts only when and as conscience commands; and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses, and whatever use he may make of them in a court of law, he will be held remediless in a court of equity. (Deweese v. Reinhard, 165 U. S. 386, 390.)

Other cases and authorities upholding this principle written into the proposed bill are cited in the recent opinion of the Supreme Court of Wisconsin in Adler & Sons v. Maglio (228 N. W. 123), where the court

denied injunctive relief and dismissed the complaint of an employer whose conduct was described by the court as follows:

> Plaintiff pursued a course of conduct that precipitated a labor war. When the tide of battle seemed to be settling against it, the plaintiff sought to withdraw from the field to which it had deliberately gone, and appealed to a court of equity for protection from the consequences that naturally flowed from the course of conduct which it had deliberately pursued.
>
> A court of conscience will not extend its strong arm to protect one who has pursued such a course of conduct. It will leave such applicant for relief where it had deliberately chosen to place itself. (P. 125.)

Later the court further upheld application of the equitable rule in the following language:

> Its strict application to all labor controversies ought to admonish both parties to these modern industrial struggles that, while they may conduct their own affairs in any way that does not violate the law, neither can be guilty of conduct that invades the rights of the other in regard to, or all events connected with, the matter of litigation, so as to in some measure affect the equitable relations subsisting between the two parties without forfeiting all right to resort to the extraordinary powers of equity. (P. 126.) (See also Cornellier v. Haverhill Shoe Manufacturers Association, 212 Mass. 554; Weegham v. Killefer, 215 Fed. 168; Pomeroy, Equity Jurisprudence (fourth ed.) sec. 398).)

The bill also provides for a speedy appeal by any party to the case who may be dissatisfied with the action of the court, either in allowing or denying the injunction; and when a case is appealed to the circuit court of appeals, it becomes the duty of that court to consider the case with the greatest possible expedition and to give such cases precedence over all other matters except older matters of the same character.

JURY TRIAL IN CONTEMPT CASES.

Section 11 of the bill provides that where a person is charged with indirect criminal contempt for violation of a restraining order or injunction, the defendant shall have the right to demand a speedy and public trial by a jury. This requirement does not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice. Neither does it apply to misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

Section 12 provides that the defendant in any proceeding for contempt of court is authorized to file with the court a demand for the retirement of the judge sitting in the proceeding if the alleged contempt arose from an attack upon the character or the conduct of the judge and if the attack occurred otherwise than in open court. Upon the finding of such a demand another judge shall be designated to hear the

contempt proceeding, as provided in section 21 of the Judicial Code.

It will be observed that sections 11 and 12 have a general application and are not confined to labor disputes.

The ordinary criminal laws provide that any person charged with a crime shall have the right to a jury trial. The person tried for contempt of court is tried for a criminal act. It is true this act has not been made criminal by a statute, but by the order of a judge. The judgment, however, can deprive the defendant of his liberty, can confine him to jail, and the length of the term of confinement is within the discretion of the judge who made the order. The judge becomes the legislature and, as such legislature, he makes something a crime that is not a crime under the general law. He then sits in judgment and tries the person who is charged with violating the law which he has enacted. What difference is it to the defendant, so far as his punishment is concerned, whether the law has been made by the judge or by the legislature? His suffering is just as great in one case as in the other. Why should he be deprived of a jury trial when the law is made by one man instead of by the regular legislative authority? And in addition to all this, what defense can be made of the law which provides that the defendant shall have no opportunity, not only for an impartial jury, but for an impartial judge as well? And when the charge is made that the contempt arises from an attack upon the character or the conduct of the judge, what prin-

ciple of justice would permit this same judge to sit in judgment upon the accused? All sense of justice and all fair judicial procedure revolt at such a condition.

If an attack is made upon the character or the conduct of the judge by a writer in a newspaper, for instance, is it fair, is it compatible with our idea of jurisprudence, that the judge against whom the attack is made should preside at the trial of the offender? Suppose a judge were assaulted on the street by a common thug. Our procedure would not permit this judge to sit at the trial of the person charged with the assault and battery. He would be tried under the laws provided by the legislature. In an injunction case, the general laws of the legislature would not apply. The person assaulted would not only preside at the trial but he would fix the punishment without regard to statute but in accordance with his own idea as to what the punishment should be.

It is interesting to note that, severe as was ancient law, it was the prevailing practice in the English courts for centuries that trials for criminal contempt were tried by a jury. It is only in the American courts in the last century that such trials by the judge alone developed. And yet we live under a Constitution which provides that—

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. (Amendment 6.)

Also—

> The trial of all crimes, except in cases of impeachment, shall be by jury. (Art. III.)

The power of the Congress to require trial by jury in cases of indirect criminal contempt should not be now subject to serious question. Criminal contempt consists of disobedience of the orders of the court, obstructions to the administration of justice, which are punished as an offense against the court and differ from civil contempt in that the purpose of punishment is not to grant relief to a litigant but to maintain the dignity of the court and uphold the power of government. Direct criminal contempt consists of misbehavior in the presence of the court or so near thereto as to interfere directly with the administration of justice. Such contempts are expressly excepted from the provisions of trial by jury. Indirect criminal contempt consists of violation of the orders of the court, which is exactly the same as the violation of law, except that the law is written in the order of the court instead of in a statute.

The Supreme Court sustained the right of trial by jury required by congressional enactment in the Clayton Act in cases of indirect criminal contempt in the case of Michaelson v. United States (266 U. S. 42), where the unanimous opinion of the Supreme Court, written by Mr. Justice Sutherland, reads as follows:

> Contempts of the kind within the terms of the statute (criminal contempts described in the Clayton Act) partake of the nature of crimes in all essential particulars. "So truly are they

crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N. S., p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way." Gompers v. U. S. (233 U. S. 604, 610-611.) * * * The statutory extension of this constitutional right (trial by jury) to a class of contempts which are properly described as "criminal offenses" does not, in our opinion, invade the powers of the courts as intended by the Constitution or violate that instrument in any other way. (pp. 66-67.)

Section 13 of the bill defines various terms used in he act, and it is not believed that any criticism has as been or will be made to these definitions.

The main purpose of these definitions is to provide or limiting the injunctive powers of the federal ourts only in the special type of cases, commonly alled labor disputes, in which these powers have been otoriously extended beyond the mere exercise of civil uthority and wherein the courts have been converted nto policing agencies devoted in the guise of preserving peace, to the purpose of aiding employers to oerce employees into accepting terms and conditions f employment desired by employers.

The proposed bill is designed primarily as a practical means of remedying existing evils, and limitations are imposed upon the courts in that class of ases wherein these evils have grown up and become ntolerable. This is a reasonable exercise of legis-

lative power, and in order that the limitation may not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes, the bill undertakes specifically to designate those persons who are entitled to invoke the protections of the procedure required.

The other sections of the bill contain the usual provisions in regard to the possibility of the court's holding portions of the act invalid and in relation to the repeal of acts in conflict with the provisions of the proposed legislation.